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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MAURICE JONES, Defendant and Appellant.	C075064 (Super. Ct. No. 07F02244)

In 2006, while serving a life sentence at California State Prison, Sacramento (CSP-SAC) for a murder and attempted murder committed in 1989 (actual sentence of life plus 22 years), with an additional 14 years imposed for various assaultive crimes (including mayhem and attempted murder) committed between 1990 and 2001 while incarcerated, defendant used a razor blade to cut another inmate. In 2010, still housed at CSP-SAC, defendant kicked a doctor in the head during a medical visit.

Charged with various crimes arising out of these two incidents, defendant entered pleas of not guilty and not guilty by reason of insanity. With respect to the 2006 incident,

the jury found defendant guilty of one count of assault on an inmate while serving a life sentence (Count 1) and possession of a sharp instrument while confined in a penal institution (Count 3). With respect to the 2010 incident, the jury found defendant guilty of battery on a non-confined person (Count 4). Thereafter, the jury found defendant was not legally insane when he committed these crimes. The jury further found defendant had seven prior strike convictions within the meaning of the three strikes law. The trial court sentenced defendant to serve an aggregate determinate term of 20 years consecutive to an indeterminate term of 54 years to life and imposed other orders.

On appeal, defendant contends: (1) his constitutional rights were violated by the trial court's use of various courtroom security measures, including the presence of multiple correctional officers and a seating arrangement that prevented defendant from sitting next to his attorney; (2) the trial court violated defendant's statutory and constitutional rights to be present during critical stages of the proceedings by having an undisclosed in camera discussion with defense counsel concerning whether or not counsel was comfortable having defendant seated next to him during the trial; (3) the trial court prejudicially abused its discretion and further violated defendant's constitutional rights by denying his motion to sever the count arising from the 2010 incident from those arising from the 2006 incident; and (4) a clerical error in the abstract of judgment and sentencing minute order must be corrected.

With the exception of correcting the clerical error, we reject each of defendant's contentions. As we shall explain, defendant's constitutional rights were not violated by the security measures employed by the trial court. The use of correctional officers to maintain order and keep those in the courtroom safe was not inherently prejudicial to defendant and was justified as a reasonable security measure. Assuming the seating arrangement separating defendant from his attorney might have conveyed to the jury he

was "especially dangerous" or "the cause of some official concern or alarm" (*People v. Stevens* (2009) 47 Cal.4th 625, 644 (*Stevens*), we conclude there was a showing of manifest need sufficient to overcome any inherent prejudice posed by this seating arrangement. (*Id*. at p. 632.) We also conclude defendant was not excluded from a critical stage of the proceedings in violation of his statutory or constitutional rights. Finally, the trial court's decision to deny defendant's severance motion was not an abuse of discretion and did not violate defendant's constitutional rights. We shall therefore affirm the judgment and order the abstract of judgment and minute order corrected to conform to the oral pronouncement of judgment.

FACTS

2006 Incident

In August 2006, after defendant finished a therapy session in the psychiatric services unit (PSU), correctional officers Charles Finnegan and Morris Bigs added him to a five-man group chain to return him to his cell. Each inmate on the chain was handcuffed behind his back and each of those handcuffs was handcuffed to the group chain that was about 10 feet long and provided about 2 feet of space between the inmates. Each inmate also had on leg irons, except for defendant. When the officers realized defendant did not have leg irons on, Bigs told him to lift his left leg and bent over to attach the irons while Finnegan grabbed defendant's arm to steady him while he lifted his leg. Before the irons were attached, defendant broke free of the officer's grip and leaped forward into the inmate in front of him on the chain. Finnegan immediately took defendant to the ground and removed him from the chain. Defendant did not resist, saying: "It's over. I'm done. It's over. It's cool."

Two other correctional officers, George Campbell and Paul Gugger, also came to assist Finnegan and Bigs with the situation. Bigs, who was watching over the other

inmates on the chain while Finnegan regained control over defendant, noticed the inmate defendant had jumped into was bleeding from the right side of his neck. This inmate had "a big gash in his neck" and "part of his ear lobe was hanging" off from the rest of his ear. Bigs informed Finnegan of the injury, Finnegan stood defendant up with the help of Campbell and asked whether he had a weapon. Receiving no response, Finnegan ordered defendant to "relinquish his weapon." At the third such order, defendant tossed a razor blade across the floor of the PSU. Finnegan watched as defendant, whose hands were still handcuffed behind him, tossed the object, but could not see what it was. A fifth correctional officer, Paul Barker, who also responded to render assistance, entered the PSU as defendant tossed the item. He immediately stood over it when it came to rest on the floor and identified it as "a razor blade wrapped with either a paper or cardboard and tape."

Each of the foregoing correctional officers testified against defendant at trial. While none of the officers actually saw defendant cut the other inmate, Finnegan and Bigs testified to seeing defendant jump into him on the group chain. Finnegan and Barker also testified to seeing defendant throw the razor blade after the attack. And while it might seem implausible defendant was able to slice the ear and neck of an inmate standing in front of him while his hands were handcuffed behind his back, Finnegan testified defendant is "very flexible" and explained he previously witnessed defendant hold a cup of water while his hands were handcuffed behind his back and bring that cup far enough around his body to be able to drink from the cup. The parties also stipulated defendant was serving a life sentence.

Based on these facts, the jury convicted defendant of assault on an inmate while serving a life sentence (Count 1) and possession of a sharp instrument while confined in a penal institution (Count 3).

2010 Incident

In August 2010, defendant was taken to a medical appointment by correctional officer Brandon Strohmaier. Defendant was seated on a chair in the triage room with his hands handcuffed behind his back while he was seen by Dr. Vuong Minh Duc. Defendant was not wearing leg irons. According to Strohmaier's testimony, defendant became "agitated" when the doctor said his name wrong. The nurse apparently gave the doctor the wrong chart, which caused the doctor to initially refer to defendant by an "Hispanic name." Defendant began "yelling derogatory statements towards the nurse." Within seconds, the nurse brought in the correct chart, but defendant was "still yelling derogatory statements." Strohmaier decided to terminate the medical visit, walked over to defendant, told him to stand up, and grabbed his right arm as he got to his feet. At this point, defendant broke free of the officer's grip and kicked the doctor in the head. Strohmaier then tackled defendant and four other correctional officers came into the room to assist in regaining control over him.

Dr. Duc also testified. His testimony generally corroborated that of Strohmaier, although he did not remember calling defendant by the wrong name. According to the doctor's testimony, defendant smirked at him when he asked for defendant's name, which made him feel uncomfortable. Strohmaier then provided the doctor with defendant's name. When the nurse came into the room with defendant's chart, he became "agitated" for an "unknown reason" and "started to scream at the nurse using profanities." At this point, Strohmaier tried to remove defendant from the room, but defendant "got up pretty fast from his chair" and kicked the doctor in the head.

Based on these facts, the jury found defendant guilty of battery on a non-confined person (Count 4).[1]

DISCUSSION

I

Courtroom Security Measures

Defendant contends his constitutional rights were violated by the trial court's use of various courtroom security measures, including the presence of multiple correctional officers and a seating arrangement that prevented defendant from sitting next to his attorney. We disagree.

A.

Additional Background

We first note defendant was removed from the courtroom prior to the start of the preliminary hearing. After his motion for substitution of appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) was denied, he threatened to disrupt the proceedings and assault one of the security officers. In defendant's words: "I'm telling you now. I'm not letting nobody talk. I'm interrupting your courtroom every time. I'm telling you now every time. I'm not even listening to you no more. Let's play the game. Y[ou] want to play the game let's play the game. I don't give a fuck. No. I'm not letting nothing -- now, I have had enough. [¶] I told you when I came in here, man, do not make me go here, man. I'm telling you now, man. You already

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[1] Because defendant does not challenge any aspect of the sanity phase of the trial or the jury's verdict of not legally insane, we dispense with a summary of the evidence adduced during that phase. Nor does defendant challenge the jury's finding he was previously convicted of seven strike offenses. Where relevant to the issues raised in this appeal, defendant's history of violent crime will be addressed in the discussion portion of this opinion.

know me, man. I am telling you. I will fuck one of you police up, man. I'm telling you, man." After defendant was removed, the preliminary hearing was continued to a later date and defendant participated in the proceedings after apologizing to the magistrate "for the way [he] acted last time."

Defense counsel raised the issue of courtroom security prior to the start of defendant's trial and informed the trial court of defendant's initial removal from the preliminary hearing. After the prosecutor noted defendant "has no qualms about telling the [correctional] officers that they know that he will hurt them if they mess with him," the trial court heard from defense counsel regarding some of his security concerns outside the presence of the prosecutor. Counsel explained he took the case over after two of defendant's previous attorneys declared conflicts of interest because defendant had threatened them. According to counsel, he informed defendant during their first conversation that he would not "tolerate any of that kind of nonsense." Thereafter, counsel's relationship with defendant was, as he described it, "an uneasy sort of accommodation" involving "many direct and veiled verbal statements" concerning what defendant might do in certain circumstances, but no actual physical violence. One such statement involved defendant threatening to spit in court because he could not do anything else while "all chained up." Counsel stated he was bringing this to the court's attention to "work out some kind of arrangement" that would prevent defendant from spitting on anyone in court, but would also involve "a minimum amount of prejudice." Counsel and the court agreed a fabric spit mask could be used to protect those in the courtroom, but that "[i]t certainly wouldn't look good to the jury." The court also suggested seating defendant at a separate table, "in an L-shape that would have him facing the jury," to provide some distance between him and counsel. The trial court

decided to hold a security hearing on a subsequent date and ordered a spit mask be placed on defendant during that hearing "out of an abundance of caution."

Prior to the start of the security hearing, before defendant was brought into the courtroom, the trial court described the seating arrangements: "We've placed an extra table here and -- for [defendant] to be separated from [defense counsel] a bit. He would also be facing the jury because that's the only other way we can do it. The courtroom isn't wide enough to put him at the end of the table and still give [defense counsel] room." The trial court asked defense counsel whether this arrangement was satisfactory and indicated it would entertain suggestions. Defense counsel answered: "As long as we have an issue of spitting, this is going to have to do." Counsel also acknowledged the distance between himself and defendant was at his request, "[o]ut of concern for [his] personal safety."

When defendant was brought into the courtroom, a correctional officer described for the record that defendant was handcuffed to a waist chain attached to his chair, he was also restrained by leg irons and wore a spit mask over his face. The trial court asked defendant whether he intended to spit on anyone in the courtroom, to which defendant said he did not. After confirming with defense counsel and the prosecutor that defendant had not previously spit on anyone in the courtroom, and receiving defendant's promise he would not do so, the trial court ordered the spit mask removed.

The trial court then heard from the correctional officer, Raymond O'Rilley, regarding the Department of Corrections and Rehabilitation's request to maintain restraints on defendant throughout the trial. After noting defendant's commitment offense, his lengthy sentence, and his removal from the preliminary hearing, O'Rilley provided the following summary of defendant's prison disciplinary history: "In 2010 he had a battery on a prisoner with serious bodily injury. In 10/15/09 he has assault on a

peace officer. 9/17/09 he disobeyed a direct order. In 2/6/09, he has serious bodily injury resulting in use of force. In 10/22/08, resisting a peace officer with the use of force. 7/1/08, he had aggravated battery on a peace officer, gassing. 3/24/08, he had possession of contraband. 7/7/06, he had possession of a weapon. 2/2/05, aggravated battery on a peace officer. 7/12/04, an attempted murder on a peace officer. 5/6/04, he had possession of a weapon which concluded a cell extraction. 4/9/04, cell fire. 12/19/01, attempted murder on a peace officer. He also has a gang affiliation of Eight Tray Gangster Crip." The officer concluded by noting defendant personally told the officer he would "make the first move" and "attack correctional staff." When asked how many correctional officers the Department intended to have in the courtroom throughout the trial, O'Rilley explained there were four such officers in the courtroom "because of the problems in court prior," but he expected that number to decrease to three officers depending on defendant's behavior.

The trial court then heard from defendant, who asked for another *Marsden* hearing and claimed he "never came in the courtroom disrespecting the courtroom at no time until [defense counsel] came on." At this point, the trial court suspended the security hearing, held a hearing on the *Marsden* motion, and denied that motion. Defendant then asked to leave the courtroom, explaining: "I feel like I'm going to do something stupid" and "I don't want to get in trouble." The trial court asked for defense counsel's input. Counsel responded he was "not joining in any request that [defendant] be removed from the courtroom." Defendant then stated: "See this is getting to me, man. You tell me to talk to somebody, yet he's sitting way over there. How can I talk to him? What do you want me to say? [The prosecutor's] sitting right there. This is when I get excited." When the trial court offered to have the prosecutor leave the courtroom if defendant wanted to discuss the matter with defense counsel, defendant attempted to relitigate the *Marsden*

motion, again said he wanted to leave the courtroom, and then asked: "Is all of my cases bind together?" At this point, the security hearing transformed into a hearing on the prosecution's motion to consolidate the complaint, for which defendant agreed to be present. When defendant later brought up security issues, the trial court asked whether defendant had changed his mind about wanting to be present for the security hearing. Defendant responded: "Yeah, let's go."

The security hearing then resumed. The trial court noted defendant wanted to be seated closer to his attorney and asked for defense counsel's thoughts. Counsel stated he was concerned for his personal safety and added: "I think we could work out some kind of arrangement. If [defendant] needs to tell me something or ask a question that we can -- I can step over and speak to him, and it wouldn't create a risk, but the seating arrangement needs to be what it is." Defendant responded: "[S]o what he's saying to you on the record is he don't trust me, so how is he going to properly represent me[?]" The security hearing again drifted into a relitigation of *Marsden* issues. When it returned to security matters, the trial court stated it believed defendant should be secured to his chair based on his own statements concerning his difficulties controlling his anger, and added: "The question is where do we go beyond that?" Defense counsel suggested: "Given the seating arrangement, I think it would not create any additional safety issues if [defendant] had at least one hand free to take notes or whatever." One of the other correctional officers in the courtroom objected to that suggestion based on threats defendant made to the officers. Defendant also stated he did not know how to write.

After some discussion concerning the manner in which defendant would be secured to his chair, the trial court informed defendant the jury would not be able to see the restraints unless he attempted to stand up or show his hands to the jury. Defendant responded: "I want them to see. I would like you to tell them I'm shackled and tell them

why." Defendant then argued he had opportunities to attack the correctional officers but did not do so and asked that his hands be cuffed to the sides of his waist chain, rather than handcuffed together and attached to the front of the chain. The trial court allowed this accommodation and noted it would allow defendant to gesture to defense counsel if he wanted counsel to come over and talk to him during the trial. Finally, the trial court ordered the leg restraints would remain in place. A curtain on the table where defendant would be seated would prevent the jury from seeing these restraints.

The next day, several pretrial motions were ruled upon. During a discussion regarding the procedure for jury selection, defendant stated, "it's kind of hard to . . . holler to [defense counsel] way over there," and asked whether counsel would be coming over to him to answer questions, and if so, whether the jury would be excused from the courtroom when that happened. The trial court responded that having the jury "running back and forth a dozen times a day" might "irritate them" and also hurt defendant's legal interests, adding: "I don't want them hearing your legal questions to your counsel, at the same time [defense counsel] has concerns about his personal safety which is why I have put some distance between you." When the trial court also noted it attempted to make the security arrangements "unobtrusive . . . so that [the jury] can't see the security chains," one of the correctional officers stated he told defendant the handcuffs could be covered up by his shirt sleeves, but defendant said he wanted the jury to see the handcuffs. The trial court asked defendant whether that was true. Defendant answered: "Yeah, that's correct." The trial court then advised defendant: "Obviously you can -- if you wish you can show the jury that you are in those chains. I don't know how that would benefit your interest in the case. I think it would -- it would tend to hurt them, but obviously if you choose to do it, I can't stop you, and your counsel can't stop you, but I'm guessing your counsel doesn't want you showing people what the security measures are." Defendant

responded: "You don't think by my attorney being way over there that that won't be nothing in their mind that something . . . is going on there because anybody -- the jury is not stupid." Defense counsel suggested the jury be admonished not to draw any inferences from the security measures and the trial court asked him to draft some language for the proposed admonition.

The following day, more pretrial matters were discussed, during which defense counsel came over to defendant three times to discuss certain issues. After one such conversation, defendant asked the trial court whether his conversations with defense counsel were confidential even though a correctional officer was "sitting right here right over [his] damn shoulder," adding: "How is that private? This man got ears." The trial court assured defendant the correctional officers would not report anything they overheard defendant say to his attorney, unless what defendant said posed a security risk. The trial court also noted even if defendant was seated next to his attorney, correctional officers would still be seated immediately behind him. Defendant again asked to be seated next to his attorney, arguing if he wanted to harm defense counsel, he could have done so when counsel came over to discuss something with him. Defendant also offered to demonstrate how it would "only take[] one second to move at him." The trial court explained defense counsel had the right to request security precautions and asked counsel whether his opinion regarding the seating arrangements had changed. Counsel said it had not.

Jury selection began the next day. Before defendant was brought into the courtroom, the trial court mentioned there was "some question [the day before] about whether [they] might be able to move [defendant] somewhat closer to [defense counsel]." Defense counsel asked to address the court outside the presence of the prosecutor, which was allowed. Defense counsel stated he spoke with defendant regarding the seating

arrangements. As counsel explained: "I told him I want you to look me right in the eye and tell me that I'm not going to have a problem if I extend you trust of letting you sit at counsel table next to me. I'm not interested in setting myself up for some kind of a sucker punch. [¶] And he would not do that. So I'm not comfortable . . . changing the seating arrangements as much as I regret the necessity to use them." Counsel also noted defendant expressed that "if he reached a certain level of frustration that use of physical force was justified because that's what he was taught growing up." The trial court stated the seating arrangements would remain as previously ordered, explaining: "I don't know that we have an option here under the circumstances given what the correctional officer told us and what your concerns are given your discussion with him. I would prefer to move him a little bit closer if I could but I'm not going to compromise your safety in that regard."

Trial proceeded with the aforedescribed security measures in place. At various points during the trial, defendant and defense counsel conferred, both in front of and outside the presence of the jury. After all of the guilt-phase evidence was presented, the following admonition regarding courtroom security measures was delivered to the jury: "Defendant . . . is a state prisoner at the California State Prison, Sacramento. [¶] As such, standard procedure requires that the Defendant be accompanied to court by California correctional officers and that there be certain courtroom security and seating arrangements. Such security and seating arrangements can differ from those used in cases involving non-prisoner defendants. [¶] None of the security and seating arrangements used in this courtroom are to be considered in any way by the jury or considered as evidence of guilt. You are to entirely disregard anything associated with such security and seating arrangements and you must decide this case solely upon the

evidence. The security and seating arrangements are not to be considered or discussed during jury deliberations."

B.

Analysis

"[A] 'trial court has broad power to maintain courtroom security and orderly proceedings. [Citations.]' [Citation.] For this reason, decisions regarding security measures in the courtroom are generally reviewed for abuse of discretion. [Citations.]" (*Stevens, supra*, 47 Cal.4th at p. 632.)

However, "some extraordinary security practices carry an inordinate risk of infringing upon a criminal defendant's right to a fair trial" and therefore "must be justified by a particularized showing of manifest need sufficient to overcome the substantial risk of prejudice they pose. For example, visible physical restraints like handcuffs or leg irons may erode the presumption of innocence because they suggest to the jury that the defendant is a dangerous person who must be separated from the rest of the community. [Citations.] The same problem arises if the defendant is required to appear before the jury dressed in prison clothing. [Citations.] In addition to their prejudicial effect on the jury, shackles may distract or embarrass a defendant, potentially impairing his [or her] ability to participate in his [or her] defense or serve as a competent witness on his [or her] own behalf. [Citations.] Similar concerns have been raised about the use of physical restraints not visible to the jury, like stun belts. [Citation.]" (*Stevens, supra*, 47 Cal.4th at pp. 632-633.)

At the same time, "the stringent showing required for physical restraints like shackles is the exception, not the rule. Security measures that are not inherently prejudicial need not be justified by a demonstration of extraordinary need." (*Stevens, supra*, 47 Cal.4th at p. 633.) For example, our Supreme Court has "consistently upheld

the stationing of security or law enforcement officers in the courtroom" without such a showing. (*Stevens, supra*, 47 Cal.4th at p. 634; see, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 998-999 [use of identifiable security guards in the courtroom not inherently prejudicial because their "presence is seen by jurors as ordinary and expected" and there are "many nonprejudicial inferences to be drawn from the presence of such security personnel"].)

Here, defendant acknowledges the trial court "was justified in ordering [him] to be shackled," but argues there was "no legitimate need" for (1) "the number of uniformed officers in the courtroom . . . situated so close to [him] during trial" or (2) "the unusual seating arrangement . . . in which [he] was not seated next to his counsel." We are not persuaded.

The first of defendant's complaints is analogous to one rejected by our Supreme Court in *People v. Ainsworth* (1988) 45 Cal.3d 984 (*Ainsworth*), disapproved on another point in *People v. Sanchez* (2016) 63 Cal.4th 665. There, four to six uniformed sheriff's deputies were positioned around the courtroom during the defendant's murder trial, two of which were posted at the door and two were seated behind the defendant. (*Ainsworth, supra*, 45 Cal.3d at p. 1003.) Rejecting the defendant's assertion that "he was denied due process of law and a fair trial by excessive security arrangements without a showing of need for such arrangements," the court explained: "Unless armed guards are present in an unreasonable number, their presence need not be justified by the court or the prosecutor. [Citation.] Undoubtedly, more than the usual number of guards were present at pretrial proceedings and during trial in this case. However, the court's remarks when overruling defendant's objections reflect the court's implicit decision that the presence of four to six uniformed guards was not unreasonable. From the limited record before us, it appears that the guards were strategically placed in the courtroom and were primarily concerned

with security outside the courtroom. Given the nature of the charges, we cannot say that the trial court erred in concluding that the measures taken were not unreasonable." (*Id*. at pp. 1003-1004.)

Similarly, here, we cannot conclude the number or placement of uniformed officers in the courtroom was unreasonable. While the record does not clearly delineate the number or placement of the officers at all times, correctional officer O'Rilley stated he expected there would be three or four throughout the trial, fewer than the four to six at issue in *Ainsworth, supra*, 45 Cal.3d 984. And while this was not a murder case, defendant was already serving a life sentence for murder and the crimes for which he was being tried involved violent acts committed while defendant was incarcerated and requiring multiple correctional officers to regain control over him. Also like *Ainsworth*, our record indicates at least one officer was seated behind defendant, but such a seating arrangement did not render the placement of the officers unreasonable in that case. Moreover, the use and placement of security officers in *Ainsworth* was justified without a showing of manifest need. Here, as defendant concedes, there was a sufficient showing of manifest need to justify the use of shackles, including threats defendant made to security staff and his admission to the trial court that he felt like he was going to "do something stupid" if not removed from the courtroom. Thus, even if such a showing was also required to justify the presence of armed officers in the courtroom, the showing was made.

Turning to defendant's second complaint, i.e., the seating arrangement preventing him from sitting next to his attorney, we note the parties have cited to no cases addressing whether such a security measure is inherently prejudicial requiring a showing of manifest need. Nor has our research uncovered any. We decline to decide the matter because even assuming the seating arrangement would have conveyed to the jury that defendant

was "especially dangerous" or "the cause of some official concern or alarm" (*Stevens, supra,* 47 Cal.4th at p. 644), we conclude manifest need was shown.

" 'Manifest need' arises only upon a showing of unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained.' [Citation.]" (*People v. Cox* (1991) 53 Cal.3d 618, 651, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) While the trial court need not hold a formal hearing to make such a determination, "the record must show the court based its determination on facts, not rumor and innuendo." (*Stevens, supra*, 47 Cal.4th at p. 633.) Here, as previously mentioned, defendant concedes a sufficient showing was made with respect to shackling. So too with respect to the seating arrangement. In addition to defendant's violent criminal history, both inside and outside of confinement, his threats to correctional staff during the trial, and his admission to the trial court that he felt like he was going to "do something stupid" if not removed from the courtroom, defense counsel informed the trial court defendant threatened to spit in the courtroom if the shackles prevented him from doing anything else, defendant would not offer counsel any assurance he would not attack him if allowed to sit next to him during the trial, and defendant instead told counsel he was taught the use of physical force was justified if he reached a certain level of frustration. On these facts, the distance between defendant and his trial counsel was manifestly necessary to ensure counsel's safety.

Finally, we also reject defendant's related claim the seating arrangement violated his right to counsel. As with his due process claim, defendant has cited no authority for the proposition a criminal defendant must be seated next to his or her attorney in order to receive effective assistance of counsel. Our review of the record reveals the contrary. At

various points during the trial, defendant and defense counsel conferred, both in front of and outside the presence of the jury. While, as the trial court acknowledged, having defendant seated next to counsel would have been preferred, it was defendant who made the alternate arrangement necessary, including defendant's behavior during the preliminary hearing, his threats to security staff, and his inability to assure counsel he would not act out violently if he became frustrated.

Defendant's constitutional rights were not violated by the challenged courtroom security measures.

II

Defendant's Absence From a Discussion Regarding the Seating Arrangements

Defendant also claims the trial court violated his statutory and constitutional rights to be personally present during critical stages of the proceedings by having an in camera discussion with defense counsel concerning the seating arrangements. He is mistaken.

"[A] criminal defendant has a right to be personally present at certain pretrial proceedings and at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, section 15 of article I of the California Constitution, and [Penal Code] sections 977 and 1043." (*People v. Cole* (2004) 33 Cal.4th 1158, 1230; *People v. Kelly* (2007) 42 Cal.4th 763, 781-782.) "Although . . . this privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow' [citation], due process clearly requires that a defendant be allowed to be present 'to the extent that a fair and just hearing would be thwarted by his [or her] absence' [citation]. Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his [or

her] presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [96 L.Ed.2d 631].)

Our Supreme Court "repeatedly has held that a defendant is not entitled to be personally present either in chambers or at bench discussions that occur outside of the jury's presence on questions of law or other matters as to which the defendant's presence does not bear a ' " 'reasonably substantial relation to the fullness of his [or her] opportunity to defend against the charge.' " ' [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357.) "Defendant has the burden of demonstrating that his [or her] absence prejudiced his [or her] case or denied him [or her] a fair trial." (*Ibid.*)

Here, as previously mentioned, on the day jury selection began, before defendant was brought into the courtroom, defense counsel asked to address the trial court outside the presence of the prosecutor, which was allowed. Defense counsel explained he spoke with defendant regarding the seating arrangements: "I told him I want you to look me right in the eye and tell me that I'm not going to have a problem if I extend you trust of letting you sit at counsel table next to me. I'm not interested in setting myself up for some kind of a sucker punch. [¶] And he would not do that. So I'm not comfortable . . . changing the seating arrangements as much as I regret the necessity to use them." Counsel also noted defendant expressed that "if he reached a certain level of frustration that use of physical force was justified because that's what he was taught growing up." The trial court kept the seating arrangement as previously ordered.

We conclude this in camera discussion was not a critical stage of the proceedings requiring defendant's presence in order to contribute to the fairness of either the security hearing or the trial itself. The security hearing had already been held at the time of the in camera conversation. Thus, the decision to seat defendant at a separate table was already

made in defendant's presence. Indeed, it was made in his presence despite the fact he asked to be removed from that hearing to avoid doing "something stupid." The in camera discussion between defense counsel and the trial court was about whether or not to change the seating arrangement. Nor would defendant's presence at that discussion have borne a reasonably substantial relation to the fullness of his opportunity to defend against the charges brought against him. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1357.) The most defendant could have done had he been present is dispute counsel's description of their conversation or change his mind about making the assurance counsel claimed he would not make. Given his conduct up to that point, neither would have been believable. Finally, defendant has also failed to carry his burden of demonstrating his absence during the in camera discussion prejudiced his case or denied him a fair trial. (*Ibid*.) We have already held defendant received a fair trial despite the seating arrangement. And even had his constitutional rights been violated, based on the strength of the prosecution's case against defendant, we would nevertheless conclude beyond a reasonable doubt the result of the proceedings would have been the same.

Defendant was not excluded from a critical stage of the proceedings in violation of his statutory or constitutional rights.

III

Denial of Defendant's Severance Motion

Defendant further asserts the trial court prejudicially abused its discretion and violated his constitutional rights by denying his motion to sever the count arising from the 2010 incident from those arising from the 2006 incident. Not so.

Penal Code section 954 provides in relevant part: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of

justice and for good cause shown, may, in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

The law prefers consolidation or joinder of charges. (*People v. Hartsch* (2010) 49 Cal.4th 472, 493.) Because the offenses charged in this case are of the same class, as defendant acknowledges, joinder is proper under Penal Code section 954. Thus, he "can only predicate error in the denial of severance on a clear showing of potential prejudice. [Citations.] We review the trial court's denial of defendant's severance motion for an abuse of discretion. [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 934.)

"'The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.' [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns into a capital case. [Citations.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 172; *People v. Vines* (2011) 51 Cal.4th 830, 855.)

Here, as a preliminary matter, we note this is not a death penalty case. Thus, the fourth criterion is inapplicable. Turning to the first criterion, the evidence in the two cases would not have been cross-admissible in separate trials, as the Attorney General acknowledges. However, a "lack of cross-admissibility is not, by itself, sufficient to show prejudice and bar joinder." (*People v. Stitely* (2005) 35 Cal.4th 514, 532; Pen.

Code, § 954.1.) "Cross-admissibility suffices to negate prejudice, but it is not needed for that purpose." (*People v. Osband* (1996) 13 Cal.4th 622, 667.) Thus, we must determine whether the remaining two criteria are sufficient to negate any prejudice potentially arising from the joinder. We conclude they are. Neither the assault on Anderson nor that on Dr. Duc was unusually likely to inflame the jury against defendant. While the former was more violent than the latter, neither was particularly gruesome. Nor is this a situation in which a weak case has been joined with a strong case such that the jury would be tempted to convict defendant of the weaker charges because the prosecution proved the stronger ones. The evidence against defendant was very strong with respect to both assaults. Indeed, multiple eyewitnesses testified against defendant as to each. There was no abuse of discretion.

Finally, we also reject defendant's assertion that even if there was no abuse of discretion, his due process rights were violated. For the same reasons the trial court did not abuse its discretion in denying severance, we also conclude "the trial court's ruling, proper when made, did not produce, in hindsight, ' "a gross unfairness . . . such as to deprive the defendant of a fair trial or due process of law." [Citation.]' [Citations.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1130, disapproved on another point in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

The trial court neither abused its discretion nor deprived defendant of his due process rights by denying his motion to sever the counts arising from the separate incidents.

IV

Correction of the Abstract of Judgment

We do agree with defendant's final contention that the abstract of judgment must be corrected. During the sentencing hearing, the trial court ordered defendant to pay a

mandatory court operations assessment of $40 for each of his three convictions, for a total of $120. The minute order incorrectly states defendant was ordered to pay $120 *per conviction*. This mistake was carried over to the abstract of judgment. As the Attorney General concedes, the correct amount for this mandatory assessment is $40 per conviction, as ordered by the trial court. (Pen. Code, § 1465.8, subd. (a)(1).) "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) We shall therefore order the trial court to correct the clerical errors in the minute order and abstract of judgment. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment is affirmed. The trial court is ordered to correct the abstract of judgment and the minute order to reflect the imposition of a court operations assessment of $120 ($40 per conviction) and to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

/s/
HOCH, J.

We concur:

/s/
RAYE, P. J.

/s/
MAURO, J.